No. 11973

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. C. SIMMONS,

Appellant,

vs.

HENRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

REPLY BRIEF FOR APPELLANT.

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Appellee Confuses the Legal Principles Applicable to This Proceeding.

The Appellee in his brief has cited numerous cases as authority for his statements of legal principles applicable to this proceeding. Because some of the statements are misleading and are not supported by the cases cited, the Appellant deems it necessary to comment on some of these citations in this reply brief.

At the bottom of page 10 of his brief, the Appellee cites *Stange v. U. S.,* 282 U. S. 270, and *Big Four Oil and Gas Co. v. Heiner,* 57 F. 2d 29, as upholding the validity of unlimited waivers. In neither of these cases was a decision on this issue necessary and both cases arose under revenue acts which did not require that the extension of the statutory period of limitations be for a "period." In the *Stange* case, the issues decided were whether the exe-

cution of a waiver after the expiration of the statute was effective and whether a consent to the determination of the liability included a consent to its collection. In the *Big Four Oil and Gas* case, the Court found that the Revenue Act of 1926 intervened and provided retroactively for collection of the tax within six years, and that the tax involved had been collected within six years. Thus, neither of these cases is direct authority for the statement made by the Appellee.

At page 11 of his brief, in commenting upon the case of *Helvering v. Ethel D. Co.,* 70 F. 2d 761, the Appellee makes certain statements which are not entirely accurate. He states that it was "definitely understood by both parties" in that case that the limited waiver was submitted because the unlimited waiver was unsatisfactory. A reading of the case discloses that the conclusion that the parties so understood and intended that the second waiver superseded the first was based upon inferences and not upon a finding of a "definite understanding." As stated in Appellant's opening brief, at page 18, the Court found that the parties must have intended the second waiver to supersede the first, because the second would have had no effect otherwise.

The Appellee further states that in the *Ethel D.* case the Court found that the new waiver was a notice of termination of the old unlimited waiver. It is true that the Board of Tax Appeals made this statement, but the Circuit Court did not base its affirmance on this ground, but rather on the ground that because the two instruments involved the same subject matter, the later one necessarily superseded the earlier one.

At page 13 of his brief, Appellee attempts to distinguish between a waiver providing for the "suspension" of the statute and one which provides a definite expiration date. It would seem that a reading of the statute should satisfactorily answer any argument the Appellee might make on this point. The applicable statute, Section 278(d) of the 1926 Revenue Act as Amended, provides for the "extension" of the statute by written agreement. In other places, Congress has used the word "suspension" as in Section 277 of the Internal Revenue Code, which provides that the statute shall be suspended pending an appeal to the Tax Court. The use of the two different words must have some significance. Hence, when a waiver, executed under Section 278(d), speaks of "suspending" the statute, its effect must necessarily be an "extension" of the statute since that is what the statute itself provides. As stated in *Wirt Franklin v. Commissioner,* 7 B. T. A. 636, at 639:

> "The instrument under consideration is denominated an 'income and profits-tax waiver.' It is in fact a bilateral undertaking entered into by the parties pursuant to the statute. Technically, it is not a waiver of the statute, for it is made pursuant to the statute. It is not an acknowledgment of any existing obligation or a new promise to pay, from which a new cause of action arises, thus beginning anew the period of limitation. It is not an agreement not to plead the statute of limitations as a defense to any asserted tax liability. In short, it is not something to be considered as in avoidance of the statute. By the statute and by its terms, it operates to extend the time."

The case of *United States v. Fischer,* 93 F. 2d 488, cited at page 13 of Appellee's brief, has already been commented upon in Appellant's opening brief at pages 21 and 22 and no further comment is deemed necessary.

It is rather hard to understand the argument advanced by Appellee at pages 14 and 15 of his brief to the effect that the 1936 waiver was void because of a mutual mistake of fact or law. In the first place, the record shows that both parties were fully aware that the unlimited waiver was outstanding at the time the limited waiver was executed, and that the status of the unlimited waiver was uncertain. Hence, they must have intended the limited waiver to supersede it and settle all doubts as to the expiration of the statute. In the second place, any mistake there may have been is based upon an assumption that the unlimited waiver was invalid. If it was invalid, then the Appellant is entitled to a reversal of the lower Court's judgment without further ado.

If the unlimited waiver was not invalid, then it was, of course, no "mistake" on the part of either party when the subsequent limited waiver was filed.

The Appellee concludes his brief on page 18 with the citation of three cases in support of the proposition that suits for refund of taxes are governed by equitable principles. It should be noted first that the cases cited involve special situations and second, that equitable principles can hardly be applicable to a situation where the statute says in plain language that taxes paid after the expiration of the period of limitations on collection constitute an overpayment and shall be refunded.

Conclusion.

For the reasons stated in Appellant's opening brief, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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